UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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BRAINWAVE SCIENCE, INC.

Plaintiff

- against -

ARSHEE, INC., DR. LAWRENCE A. FARWELL,

DR. THIERRY MAISON and BRAIN

FINGERPRINTING FOUNDATION

                          Defendants.

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Motion to issue a finding of fact on the relevant facts before ruling on Plaintiff's Motion for Partial Summary Judgment of December 16, 2022 (EFS #106).

Civil Action No.: 21-cv-4402 (BMC-RLM)

Honorable Brian M. Cogan
United States District Court Judge
U.S. Eastern District, New York

December 31, 2022

Dear Judge Cogan:

1. I am a Defendant in this case.

2. In this Letter Motion, I am writing to request that this Court issue a finding of fact regarding certain relevant facts, and that this be done before ruling on Plaintiff's December 16, 2022 Motion for Partial Summary Judgment ("Plaintiff's Motion," EFS #106).

3. This Court's Preliminary Injunction of December 13, 2021 stated: "For the purposes of this preliminary injunction, 'confidential or proprietary information' is defined as any portion of the program plaintiff originally submitted to Codequiry as its code."

4. This constitutes a Motion regarding consideration of and ruling on the facts relevant to Plaintiff's Motion.

5. The relevant facts are as follows.

6. This document refers to six software programs that are now before this Court as evidence in this case, cited along with the source where the evidence is located.

7. Dr. Larry Farwell's Application is located in two places. Dr. Larry Farwell's Application that is integrated into the Visual Studio /Microsoft .NET framework is located on Dr. Maison's TFS/ DevOps, to which Dr. Farwell no longer has access (Dr. Maison TFS). This is provided to Mindfire Technology, which is currently conducting an analysis and comparison of software as per the order of this Court, by Dr. Maison granting access to his TFS to Mindfire, which Dr. Farwell has requested. Dr. Larry Farwell's Application that is not integrated into said environment is in a folder transmitted by Dr. Farwell to Mindfire by uploading to Dropbox and providing Mindfire with the link ("Dr. Farwell Dropbox"). Note that this is "Confidential Information" of Dr. Farwell per the Consulting Agreement with Mindfire, and consequently neither Brainwave Science, Inc. ("Brainwave" or "BWS") nor anyone else other than Mindfire is given access.

8. The six software programs now before this Court as evidence in this case, and where said evidence in each case is located and accessible to this Court, are as follows.

    a. Farwell Brain Fingerprinting 3.0 (Dr. Farwell Dropbox) is a version of Dr. Farwell's Brain Fingerprinting software developed by Dr. Farwell in the early 1990s that Dr. Farwell applied at the FBI, the CIA, the US Navy, and in scientific research, scientific publications, and applications in criminal investigations, intelligence, and counterterrorism.

    b. Farwell Brain Fingerprinting 4.0 (Dr. Farwell Dropbox) is a version of Dr. Farwell's Brain Fingerprinting software developed by Dr. Farwell in the early 2000s that Dr. Farwell applied in scientific research, scientific publications, and , and applications in criminal investigations, intelligence, and counterterrorism. It comprised the addition to 3.0 of a more advanced data analysis section.

    c. Farwell Brain Fingerprinting 5.0, aka Neurodyne (Dr. Maison TFS) is a newer version of the Farwell Brain Fingerprinting software ported from versions 3.0 and 4.0 to the

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Visual Studio / Microsoft .NET environment and translated to the C# language. Dr. Maison developed it and gave it to Dr. Farwell. This is the software labeled "Dr. Larry Farwell's Application" in Plaintiff's CEO's Affidavit (EFS 20-2, Exhibits B, C, and D) and submitted to Codequiry.

d. Farwell Brain Fingerprinting 6.0 (Dr. Maison TFS) is the software that Dr. Farwell sold, transferred, or demonstrated to clients and allowed scientific colleagues at the University of Canterbury to use in conducting research in collaboration with Dr. Farwell.

e. Dr. Maison BWS Software, aka "iCognative" (Brainwave Science TFS) is the version of the software developed by Dr. Maison for BWS **before BWS obtained a copy of "Farwell Brain Fingerprinting 5.0" / "Neurodyne" / "Dr. Larry Farwell's Application" from Dr. Maison** on June 29, 2021. Like Farwell Brain Fingerprinting 5.0, it was ported from Farwell Brain Fingerprinting 3.0 and 4.0 to the Visual Studio / Microsoft .NET environment and translated to the C# language.

f. BWS Fraudulently Modified Software, also aka "iCognative" (Brainwave Science TFS) is a modified version of the software originally developed by Dr. Maison for BWS that BWS later modified to make it appear more similar to "Dr. Larry Farwell's Application" **after BWS obtained a copy of "Dr. Larry Farwell's Application" / "Farwell Brain Fingerprinting 5.0" / "Neurodyne" from Dr. Maison** on June 29, 2021.

9. **The most obvious and easily detectable modification that BWS made to the Dr. Maison BWS Software in creating the BWS Fraudulently Modified Software was changing the background color from blue to green.** The various versions of the software and revision histories, which are now in evidence before this Court (BWS TFS, Dr. Maison TFS), will reveal what other changes BWS made in order to make the BWS Fraudulently Modified Software more similar to Dr. Larry Farwell's Application than Dr. Maison BWS Software is to Dr. Larry Farwell's Application.

10. Even if essential material statements bearing on the major facts at issue in this case in BWS' Statement of Undisputed Facts were true – which they are not – and they were undisputed – which they are not – these would be insufficient facts to warrant a summary judgment. To make a summary judgment in favor of Plaintiffs, this Court would have to accept as fact two other major things that are not facts, but rather false fabrications and fraud by BWS. The first of these is as follows.

a. The foundation of Plaintiff's case in this lawsuit is a comparison between two sets of software code with respect to user interfaces and comparison in Codequiry.

b. One set of code is "Farwell Brain Fingerprinting 5.0" / "Dr. Maison BWS Software," "Neurodyne," the code developed by Dr. Maison and conveyed to Dr. Farwell, (Dr. Maison TFS), referred to in Plaintiff's documents as "Dr. Larry Farwell's Application" (EFS #20, #20-2, and Exhibits B, C, and D). An examination of Dr. Maison TFS will show, presumably, that this is in fact what Plaintiff Brainwave Science (BWS) represented it to be.

c. The other set of code Plaintiff represented as Dr. Maison BWS Software, aka "iCognative" (Brainwave Science TFS), the version of the software developed by Dr. Maison for BWS **before BWS obtained a copy of "Farwell Brain Fingerprinting 5.0" / "Neurodyne" / "Dr. Larry Farwell's Application" from Dr. Maison** on June 29, 2021.

d.   In fact, an examination of the relevant evidence in BWS TFS will show that the second set of software that BWS submitted for the comparison was NOT the software described in ¶ 3c above that BWS represented it to be. Rather, it was "BWS Fraudulently Modified Software," (BWS TFS) which BWS also called "iCognative" (BWS TFS). This is the version of the software that BWS <u>modified to make it appear more similar to "Dr. Larry Farwell's Application"</u> **after BWS obtained a copy of "Dr. Larry Farwell's Application" / "Farwell Brain Fingerprinting 5.0" / "Neurodyne" from Dr. Maison** on June 29, 2021. (BWS TFS).

e.   **<u>The most obvious and easily detectable modification that BWS made to the Dr. Maison BWS Software in creating the BWS Fraudulently Modified Software was changing the background color of the user interface from blue to green.</u>** The revision histories and different versions of the two software programs, which are now in evidence before this Court (BWS TFS, Dr. Maison TFS), will reveal what other changes BWS made in order to make the BWS Fraudulently Modified Software more similar to Dr. Larry Farwell's Application than Dr. Maison BWS Software is to Dr. Larry Farwell's Application.

11. Because of the facts stated in above, the entire foundation of Plaintiff's claims in this lawsuit is based on fraud. Even if all of the statements that Plaintiff claims are "Undisputed Facts" (EFS #106-1) were true and undisputed – which they are not – that would not constitute grounds for a partial summary judgment, because the more fundamental "facts" on which such a judgment would be based are fraudulent fabrications by BWS, not facts.

12. In its original Complaint (EFS #1) and MOL in Support of Motion for Summary Judgment (EFS #20) and Ika's Affidavit ("Ika's Affidavit," EFS #20-2 and Exhibits B and D thereto), Plaintiff Brainwave Science defrauded this Court in the following way.

a.   Plaintiff had Dr. Maison BWS Software in their TFS repository, as Dr. Maison had developed it for BWS (EFS #20).

b.   BWS obtained from Dr. Maison a copy of "Brain Fingerprinting 5.0" / "Neurodyne" / "Dr. Larry Farwell's Application" from Dr. Maison (EFS #20).

c.   Then BWS fraudulently modified "Dr. Maison BWS Software" / "iCognative" to make it looks more similar to "Dr. Larry Farwell's Application" (BWS TFS, Dr. Maison TFS, EFS #24, Dr. Farwell 12/27/2022 Affidavit).

d.   One way in which the software was modified was to change the background color of the user interface. All versions of "Maison BWS Software" / "iCognative" before June 29, 2021 when BWS obtained "Dr. Larry Farwell's Application" from Dr. Maison (EFS #89 p. 1:26 - 28), had a blue background (EFS #89 1:20 – 2:9). "Dr. Larry Farwell's Application" had a green background. BWS Modified "iCognative" to change the background from blue to green to match "Dr. Larry Farwell's Application" (Dr. Farwell 12/27/2022 Affidavit; EFS #89 1:20 – 2:9).

e.   Then Ika developed Ika Affidavit (EFS 20-2) and Exhibit D thereto to show the two user interfaces side by side. BWS falsely represented that the software compared to "Dr. Larry Farwell's Application" (Dr. Maison TFS) was the original, unmodified software (BWS TFS) developed by Dr. Maison for BWS. In fact, **the software actually compared was the Fraudulently Modified BWS Software (which BWS called "iCognative"), which had been specifically modified to more closely resemble "Dr. Larry Farwell's Application"**. This can be readily proven with

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evidence now before this Court, by Mindfire comparing the various versions, dates, and modification histories of "Dr. Larry Farwell's Application" in Dr. Maison's TFS with the various versions, dates, and modification histories of "iCognative" in BWS' TFS. Mindfire already has, or will shortly have, access to Dr. Maison's TFS and BWS' TFS in order to accomplish the court-ordered comparison.

f. Examining the modification histories and identifying the several versions of each software program in Dr. Maison TFS and BWS TFS is a necessary prerequisite for Mindfire conducting its comparison tests. Otherwise, Mindfire will not know what is being compared to what. It is necessary for Mindfire to differentiate between "Dr. Maison BWS Software" and "BWS Fraudulently Modified Software" in order to know what is actually being compared to Dr. Farwell's software in the court-ordered software analysis and comparison. (Dr. Maison TFS, BWS TFS). Otherwise, any comparison would be meaningless or worse. If a comparison based on false representations by BWS regarding what software is being compared – as the original comparison that formed the foundation of Plaintiff's Complaint was – then the comparison would be fraudulent, like the original comparison that formed the foundation of Plaintiff's case.

g. BWS also submitted "Dr. Larry Farwell's Application" (Dr. Maison TFS) and the "Fraudulently Modified BWS Software" (BWS TFS) to Codequiry to test the similarity between the two. Again, BWS falsely represented that the software compared to "Dr. Larry Farwell's Application" was the original, unmodified software (Dr. Maison BWS Software) developed by Dr. Maison for BWS. In fact, **the software actually compared was the Fraudulently Modified BWS Software (which BWS called "iCognative"), which had been specifically modified to more closely resemble "Dr. Larry Farwell's Application".**

h. BWS also submitted only part of the "iCognative" (BWS TFS) and "Dr. Larry Farwell's Application" (Dr. Maison TFS) code to Codequiry (Ika Affidavit EFS #20-2, Exhibit D, pages 7, 8.). BWS did not submit for comparison the parts of the software that were totally different between the two, namely the parts that communicated with the two different headsets used by BWS and Dr. Farwell (BWS TFS, Dr. Maison TFS).

i. In the Ika Affidavit (EFS 20-2, Exhibit D, p. 8) the navigation page has been changed from blue to green in the BWS software on the left of the page. The Replay function that overlays the navigation page still has a blue background, like all screens in all versions of BWS Software before BWS obtained the code with the green background from Dr. Maison and modified their code to match. This may be because the Replay function involves real-time activities (such as displaying ongoing EEG), and no one at BWS after Dr. Maison's exit has the necessary software development skill to modify this complicated code. The trivial navigation and data entry pages are easy to modify; the actual functional pages are more difficult. In any case, this screenshot illustrates that BWS modified the Dr. Maison BWS Software to change the blue background to a green background to make it appear more similar to Dr. Larry Farwell's Application. (The Replay function was copied from the "Demo" function in Farwell Brain Fingerprinting 3.0, and has an identical user interface to the same.) (Dr. Maison TFS, BWS TFS).

13. **The fraud by BWS in generating BWS' Fraudulently Modified Software can readily be exposed in the course of Mindfire's court-ordered comparisons of the software by examining**

the dates and version history in BWS TFS and Dr. Maison TFS, which is an integral and necessary part of the court-ordered analysis, comparison, and report. This is a prerequisite for Mindfire to make any software comparisons. Mindfire cannot make meaningful comparisons until they have determined which software is being compared. (Dr. Farwell 12/27/2022 Affidavit, Dr. Maison TFS, BWS TFS).

14. **BWS can defraud this court a second time only if the Court cooperates in this fraud by allowing BWS to refuse to provide Mindfire access to BWS TFS and instead proffers the Fraudulently Modified BWS Software and falsely represents that it is the original, unmodified Dr. Maison BWS Software that Dr. Maison provided to Dr. Farwell.** This would simply be a repeat of the fraud perpetrated by BWS that forms the foundation of this lawsuit. Note that it is easy to fabricate or fake text and executable files stored on computer disk or transferred electronically. **Both the content and the dates of such files can be fraudulently altered. However, the versions, version history, and modification history in Brainwave TFS and Dr. Maison TFS cannot be faked or fraudulently modified. The version history is embedded in the TFS data, and cannot be modified. For this reason, it is necessary for Mindfire to directly access BWS TFS and Dr. Maison TFS, and not simply assume that BWS' representations regarding the software they may proffer outside TFS are truthful.**

15. **Ika and Tomkins lied about the software in the documents that are the foundation of this case (EFS #1, EFS #20, EFS #24) – as can now be readily proven with evidence now before this Court in the BWS TFS and the Dr. Maison TFS. Ika and Tomkins could certainly defraud this Court again if this Court takes their lies as fact rather than considering the actual evidence that is now before this Court in Dr. Maison TFS and BWS TFS.**

    a. In the Codequiry test and screenshots that are the foundation of Plaintiff's Complaint, Plaintiff lied to this Court and falsely represented that the code submitted to Codequiry was Dr. Maison's BWS Code, the software that Dr. Maison developed for BWS. In fact, the code submitted to Codequiry and represented in the screenshots (EFS #20, Exhibit D) was BWS Fraudulently Modified Software, which had been changed from a blue background to a green background to more closely match Dr. Larry Farwell's Application to which it was compared.

    b. The only way to prevent BWS from defrauding this Court again is to use the actual software in BWS TFS for the comparisons, since the TFS environment contains a record of the software, dates, and versions that, unlike files stored on BWS' disks, cannot be faked.

16. The specific method for proving that the foundation of this lawsuit presented by BWS is fraudulent is to show that BWS did not have any version of iCognative with a green background before June 29, 2021, as follows.

    a. June 29,2021 is the date BWS received "Dr. Larry Farwell's Application" from Dr. Maison – and subsequently modified their "iCognative" code to have a green background to match Dr. Larry Farwell's Application (EFS #89, page 2, 1 – 9).

    b. To be valid, the proof must include Visual Studio access to the files that create the visual interface (XAML files) with a review of the TFS change history of those files. Brainwave Science is using an on-premises TFS server. To be valid, the proof must also include a validation of the application installer program analyzed for digital signature, modified and creation date, and installed to verify the background color. The digital certificate used for code-signing is provided by DigiCert (a Microsoft-approved

code-signing certificate vendor) and is timestamped with web time service. This means, in practice, that the time of different modifications and versions cannot be faked if the proper procedure outlined here to find the facts is followed by the finder of fact. (EFS # 89, 1:20 – 2:20).

    c. Any failure of BWS providing a functioning application with a green background properly traceable to Brainwave Science development environment (TFS), properly dated before June 29, 2021, with a digital signature will provide proof that Ika's Affidavit (EFS #20-2, Exhibit D), and the entire foundation of this lawsuit was fabricated and fraudulent.

    d. Any excuses from BWS as to why they will not allow this Court, through Mindfire, to access the definitive evidence now before this Court, as described above – and any demands that this Court should simply accept as fact BWS' representations regarding the substantive matters at hand, rather than accessing the actual evidence and determining the actual facts – would be easily recognized as a transparent attempt by Ika and Tomkins to obstruct this Court's mission as a finder of fact.

17. The Preliminary Injunction in this case was based on the possibility that the statements of the Plaintiff regarding the code submitted to Codequiry, the user interfaces displayed in Plaintiff's documents, the software development done by Plaintiff, and the Plaintiff's business activities were truthful, and applying the law to those statements on that basis.

18. Sufficient evidence is now before this Court, in Dr. Maison TFS and BWS TFS, to prove that Plaintiff's statements regarding the software tested in Codequiry and displayed by Plaintiff in its documents – in particular Ika's Affidavit (EFS #20-2, Exhibit B, C, and D – were false.

19. The relevant facts are specified in detail in Dr. Farwell's 12/27/2022 Affidavit in Opposition to Plaintiff's Motion for Partial Summary Judgment and the Exhibits thereto.

20. Specifically, Plaintiff represented that the Codequiry test and user interface comparisons EFS #20-2, Exhibits B, C, and D) were between **Dr. Maison BWS Software** and Dr. Larry Farwell's Application, whereas evidence now before the Court in Dr. Maison TFS and Brainwave TFS will prove that the comparisons were between **BWS Fraudulently Modified Software** and Dr. Larry Farwell's Application – as I, Dr. Lawrence A. Farwell, have alleged.

21. This Court's Order of August 21, 2022, stated: "If Dr. Farwell's allegations about BWS fraudulently modifying its software prior to its submission to Codequiry are true…then sanctions will be levied against BWS and the preliminary injunction will be lifted."

22. My said allegations are true, and the necessary evidence to prove that is now before this Court, as described above.

23. It would be an error and a miscarriage of justice for this Court to rule in favor of Plaintiff's Motion for Partial Summary Judgment if said allegations are true, and in fact the entire foundation of Plaintiff's Complaint constitutes fraud.

24. In light of the above, I respectfully request that this Court issue a Finding of Fact as to whether "the program plaintiff originally submitted to Codequiry as its code" and the software represented in the screenshots in Ika's Affidavit, Exhibits B, C, and D was

    a. Dr. Maison BWS Software, aka "iCognative" (available in Brainwave Science TFS), the version of the software developed by Dr. Maison for BWS **before BWS obtained a copy of "Farwell Brain Fingerprinting 5.0" / "Neurodyne" / "Dr. Larry**

Farwell's Application" from Dr. Maison on June 29, 2021 – as Plaintiffs have represented;

Or, alternatively, said program was

b. BWS Fraudulently Modified Software, also aka "iCognative" (available in Brainwave Science TFS), the version of the software that BWS modified <u>to make it appear more similar to "Dr. Larry Farwell's Application"</u> **after BWS obtained a copy of "Dr. Larry Farwell's Application" / "Farwell Brain Fingerprinting 5.0" / "Neurodyne" from Dr. Maison** on June 29, 2021 – as I have alleged, and as the evidence now before this Court proves.

25. I respectfully request that said Finding of Fact be issued before this Court rules on Plaintiff's Motion for Partial Summary Judgment, and that in ruling on Plaintiff's Motion this Court consider the actual facts, and not merely Plaintiff's unsupported (and demonstrably false) representations regarding "the program plaintiff originally submitted to Codequiry as its code" and the screenshots in Ika's Affidavit, Exhibits B, C, and D.

Sincerely,

Lawrence A. Farwell

Dr. Lawrence A. Farwell

Defendant

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